APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

No. 73—October Term, 1955.

(Argued October 7, 1955 Decided November 7, 1955.)

Docket No. 23601

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[SAME TITLE]

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Before:

HAND, MEDINA and LUMBARD,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York. Edward A. Conger, *Judge.*

Plaintiffs appeal from an order setting aside verdicts in favor of plaintiffs and directing judgment in favor of plaintiffs in the amount of $16,600 only. Affirmed.

MANES, STURIM, DONOVAN & LAUFER, New York City (Arthur M. Laufer and Samuel S. Sturim, New York City, on the brief), *for plaintiffs-appellants.*

HAIGHT, GARDNER, POOR & HAVENS, New York City (William J. Junkerman and James B. McQuillan, New York City, of Counsel), *for defendant-appellee.*

MEDINA, *Circuit Judge:*

The parents of the infant plaintiffs and twenty-six other persons met their deaths during the early hours of the morning of November 29, 1949, when defendant's Douglas

DC-6 airplane, on an international flight from New York to Mexico City, crashed at Love Field, Dallas, Texas.

While plaintiffs contended that the Warsaw Convention was not applicable, because the passenger tickets issued to decedents did not make reference to the intermediate "agreed stopping places"[1] of Washington, D. C., and Dallas, Texas, motions to strike the usual Warsaw Convention limitation of liability defenses, based upon this technical and wholly unsubstantial alleged omission, were denied before trial by Judge Noonan. We agree with Judge Noonan's reasoning and see no occasion to elaborate upon his carefully prepared opinion. *Grey* v. *American Airlines*, 95 F. Supp. 756 (S. D. N. Y. 1950).

At the trial the principal issue was whether or not plaintiffs had adduced evidence sufficient to support a finding that the disaster was due to "wilful misconduct" on the part of defendant's employees, or any of them. The jury found that it was; but the trial judge, after taking under advisement defendant's motion to set aside the verdicts and direct judgment in favor of plaintiffs for $16,600, or the limited amount of $8300 on account of the death of each decedent, reviewed the evidence in some detail and, in the order now appealed from, granted the motion.

In limine plaintiffs contend that the trial judge lacked power to entertain the motion, at least with reference to so much of plaintiffs' claim as arises out of the death of the mother, Sophie Goldberg, under F. R. C. P. 50(b), because no motion for a directed verdict was made by defendant "at the close of all the evidence" to the effect that the jury should find in plaintiffs' favor for the sum of $8300 "arising out of the death of Sophie Goldberg." We had supposed the winds of time had long since carried into oblivion such flimsy excuses for avoiding a consideration

1. Presidential Proclamation of October 29, 1934, 49 Stat. Pt. 2 at p. 3000 *et seq.*

of the merits of a case. From the outset defendant urged that there could be no recovery in excess of $8300 for the death of either decedent; motions for directed verdicts with respect to the claims arising out of each of the two deaths were made at the close of plaintiffs' case; the contention was again made *in extenso* at the close of all the evidence. It was mere inadvertence that no reference was again made specifically to Sophie Goldberg. Accordingly, the trial judge had ample authority under Rule 50(b) to set aside or disregard the verdicts and dispose of the case with finality, subject to appellate review.

The plane left La Guardia Airport at 10:30 P. M.; took off from Washington, D. C., for Dallas at 12:54 A. M., and, when in the vicinity of Nashville, Tennessee, the outboard engine on the port wing, known as the #1 engine, commenced to backfire, as a result of which it was feathered and shut off. Without further incident Dallas was sighted and the plane was cleared to land on runway 36. We are concerned with what occurred between the time the plane crossed the boundary of the airport at an altitude of 200 feet, until it crashed on top of the hangar of the Dallas Aviation School on the edge of the airport opposite the direction tower. The crew, consisting of the Captain, the First Officer and the Flight Engineer, survived; and their testimony gives us a certain amount of data, together with some flat contradictions and a mass of conflicting possible inferences. Before giving a brief resume of the evidence, it will be well to set forth the applicable law.

The scheme of the Warsaw Convention is pretty plain on its face. Chapter III is the one which concerns us here. Article 17 imposes an absolute liability upon the carrier for all personal injuries, regardless of fault, "if the accident which caused the damage so sustained took place on board the aircraft." But this liability is excused by Article 20(1), if "the carrier proves" that it "has taken all necessary measures to avoid the damage or that it was impos-

sible" for it to take them. As to this it is plain that the burden of proof is upon the carrier. And, in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be almost if not quite insurmountable.

Against this background we come to Article 25, which provides that the carrier shall not be entitled to avail itself "of the provisions of this Convention which exclude or limit" its liability, if the damage is caused by its "wilful misconduct." The exclusion refers to Article 20(1), and the limitation to Article 22(1), which provides that "the liability of the carrier to each passenger shall be limited" to $8300. Upon whom is the burden of proving wilful misconduct?

The trial court here instructed the jury that the burden of proving wilful misconduct rested upon plaintiffs, and plaintiffs acquiesced in this, virtually conceding that it was not incumbent upon defendant to sustain the onus of proving a negative. As will shortly appear, the real cause of the crash still remains in doubt, and we feel that the interest of justice requires that we decide this question, even though the parties have apparently taken the answer for granted.

We hold that the trial judge ruled correctly when he charged the jury that plaintiffs could recover no more than $8300 on account of the death of each decedent, unless plaintiffs proved by a fair preponderance of the credible evidence that there was wilful misconduct on the part of defendant's employees, or any of them, which was a "substantial contributing factor" to the accident. The specific language of Article 20(1), above quoted, and the absence of corresponding words in Article 25 would seem to make admissible no other interpretation of the Convention. But perhaps of greater significance is the general purpose of protecting international air carriers from the burden of

excessive claims connected with the loss of aircraft under circumstances which make it impossible, or virtually so, to determine the mechanical or human shortcomings which caused the disaster, because of the death of all on board and the destruction of the plane. We find implicit in the terms of the Convention an intention to relieve the carriers of this burden of proof, whilst at the same time giving the injured parties the opportunity to prove wilful misconduct, if they can.

There is no dispute as to what constitutes wilful misconduct. The instructions required proof of "a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." This was in accordance with precedent. [*American Airlines* v. *Ulen*, 186 F. 2d 529 (D. C. Cir. 1949); *Pekelis* v. *T. W. A.*, 187 F. 2d 122 (2 Cir. 1951); *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105 (1952), aff'd 305 N. Y. 830, certiorari denied, 346 U. S. 474.]

Moreover, as this is a jury case, plaintiffs are entitled to have the evidence viewed in the light most favorable to plaintiffs. All questions of credibility were for the jury. It was within their province to pick and choose, to accept a part or the whole of the testimony of any particular witness, and to reject the rest. Where conflicting inferences were rationally admissible, it was a function of the jury to take those which they considered most consistent with the general pattern of the proofs. And this congeries is summed up in the general verdicts. The trial judge had a right to reject the finding of wilful misconduct only if, on no possible view of the evidence, could reasonable men reach that conclusion. *Binder* v. *Commercial Travelers*, 165 F. 2d 896 (2 Cir. 1948); 3 Moore, Federal Practice §50.01 (1938).

We now return to the evidence of the events which crowded into the brief interval of time between the crossing of the boundary of the airport at a height of 200 feet and the crash.

The Flight Engineer suddenly reported that the fuel flow gauge on engine #4, the outboard starboard engine, read zero. The Captain at once ordered the fuel booster pump applied, and the Captain testified that he felt that engine "surge," which caused the left wing to dip 20° and the plane to swerve to the left and out of line with the runway. Reduction of power on the #3 and #4 engines and increase of power on #2 apparently brought the plane level and she was about 30 or 40 feet above the ground. The Captain says he ordered the landing gear retracted and the flaps raised, with full take-off power on the three operating engines. The First Officer says he did not hear any order but knew from the actions of the Captain that he was attempting to pull up and make another try for the field. That the plane gained altitude is apparent from the fact of where she hit on top of the hanger of the Dallas Aviation School.

But in the interval, without any order from the Captain, the First Officer feathered the #4 engine, and the Captain claims that this was what caused the crash. The First Officer says the instruments indicated that #4 was "windmilling," that the unfeathered propeller without power behind it would operate as a drag, and that he left the flaps as they were because to level them off would, in his opinion, have resulted in an immediate loss of altitude. There was testimony that there was still power in #4 and that the levelling of the flaps would have helped the plane to rise, although this seems improbable in view of her position so close to the ground. In any event, the plane stalled and fell.

If defendant had the burden of proving that there was no wilful misconduct on the part of any member of the crew, we think a jury would have been warranted in finding on

this record that the burden had not been sustained. There are too many gaps and imponderables, to say nothing of the conflicts and inconsistencies, some of which we have not thought it necessary to collate.

But we cannot discover anything in the case to warrant a finding that there was wilful misconduct. It is said that the Captain was in command and that he was the only one authorized by Civil Air Regulations 61.301, 61.310, to act in an emergency. But we find nothing in the Regulations to justify this conclusion. The plane was *in extremis;* whatever the First Officer did or failed to do was done to save the plane and the lives of all on board including his own.

True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record is still devoid of any evidence of wilful misconduct.

Much is also said on plaintiffs' behalf of defective instruments and previous backfiring by the engine which was feathered when near Nashville, but it is abundantly plain to us that each and every member of the crew thought the plane was airworthy when they left Washington, D. C. for Dallas; and the evidence referred to is of trivial consequence.

Other alleged errors seems to us not to warrant discussion.

Affirmed.

Opinion of United States District Court, Southern District of New York

[SAME TITLE]

APPEARANCES:

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CONGER, D. J.:

Defendant moves for the following relief:

(1) to set aside the verdicts of the jury and for judgment dismissing the complaint in amounts in excess of $8,300 for each passenger; and in the alternative.

(2) a new trial upon the grounds that the verdicts are contrary to the evidence and law and are excessive.

The jury returned verdicts as follows:

For the death of Harry M. Goldberg:
Howard M. Grey.....$50,000
Doris S. Grey..... 30,000.

For the death of Sophie Goldberg:
Howard M. Grey.....$ 5,000
Doris S. Grey.....$ 5,000.

The evidence disclosed that the decedents, father and mother of the infant plaintiffs, were killed in the crash of defendant's Douglas DC-6 airplane, upon which they were passengers, at Love Field, Texas, on November 29, 1949.

The principal issue at the trial was whether the deaths were caused by wilful misconduct upon the part of defendant's agents.* The jury's verdicts reflect an affirmative resolution of this issue.

(1) Defendant now contends, as it did at the end of plaintiffs' case and at the close of the evidence, that, according every reasonable inference to the evidence, it was insufficient to sustain a finding of wilful misconduct.

There is a dispute between the parties concerning the plaintiffs' obligation to "specify" the acts of wilful misconduct.** Certainly, there is no specification in the complaint unless the general allegations of paragraph 17 may be so regarded. Plaintiffs' counsel did specify certain acts

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*Article 25 of the Warsaw Convention (49 Stat. Pt. 2, pp. 3000 *et seq.*) provides as follows:

> "(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.
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> "(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

Unless the plaintiffs prove wilful misconduct, then recovery is limited to $8,300 per death in accordance with Article 22 of the Convention.

**In *Froman* v. *Pan American Airways*, Supreme Court, N. Y. County, aff'd without opinion by the Appellate Division, 1st Dept. (N. Y. L. J. Nov. 4, 1954), the Trial Judge charged the jury that the plaintiffs are required to specify the acts of wilful misconduct.

in his opening statement. Whether or not this practice discloses sufficient specification at this point, I am not prepared to say. In his summation, plaintiffs' counsel again alluded to acts of wilful misconduct and some time before the end of the trial, plaintiffs' attorney gave me a paper which contained "Plaintiffs' specifications of wilful misconduct on the part of the defendant." My recollection is that this paper was given me by plaintiffs' attorney the evening before the summations were to start. In his opening and summation plaintiffs' attorney did not refer specifically to this list of specifications but my recollection is that he did refer particularly in his summation to acts and conduct of defendant's employees which he characterized as acts of wilful misconduct.

Defendant's attorney stated in the argument on this motion that this paper was handed to him just as he got up to make his summation; that he never read it until the case was over.

It seemed to me that this list summarized in effect those acts of wilful misconduct which plaintiffs' counsel had referred to in his opening and summation. This list was not read to the jury nor incorporated in the charge. At the end of the charge the attorney for defendant excepted to my failure to charge defendant's request to charge No. 8, to the effect that plaintiffs be required to specify what act or acts they claimed constituted wilful misconduct.

I refuse to so charge because I felt that after giving to the jury instructions as to what constituted wilful misconduct as applied to this case, it was its duty and obligation to view the evidence and ascertain under the yardstick of the law I had given them, whether any act or acts of wilful misconduct had been proven by plaintiffs.

The list submitted follows:

> "a. That defendant's First Officer Robert E. Lewis, in violation of all laws, rules and regulations,

with knowledge that No. 1 engine was feathered, deliberately and with intent feathered #4 engine while the Captain in command of the plane was then and there in control of the said aircraft and in the process of maneuvering the same for the purpose of gaining altitude or applying power to the said engines for the purpose of effecting a safe and proper landing under the circumstances by going around again for a new approach and landing.

b. That the said defendant by its First Officer Lewis, with full knowledge of the probable consequences of such act, omitted to comply with the orders of the Captain in command of the said flight, to raise the flaps from fully extended position at the time the gears were retracted for the purpose of a 'go around' for a new landing.

c. That Captain Sperry on preceding flight #48 of Nov. 28, 1949 omitted to report the backfiring and trailing of smoke from #1 engine while over Advance, Missouri at an altitude of 17,000 feet with knowledge of the fact that the defect of such engine if not corrected would probably result in injury or damage to passengers.

d. That the defendant by its agents, servants and employees committed an act of wilfull misconduct by continuing said airplane in service transporting passengers, with full knowledge of the previous defective condition of engines #1 and #4 known to defendant's mechanics, inspectors, pilots and agents to exist for a considerable period of time despite previous corrective action taken.

e. That the defendant committed an act of wilfull misconduct in permitting flight 157 to take off from LaGuardia Field at the time and place of de-

parture with knowledge of the defects in engines #1 and #4 without requiring check flight test.

f. That the defendant, its servants, agents and employees permitted the said plane to continue in service transporting passengers without making necessary repairs or taking necessary action because of inability to obtain new parts or because they did not have time or something of that nature.

g. That with knowledge of the existing condition of the said airplane on November 28-29, 1949, the defendant's servants, agents or employees committed wilfull misconduct in permitting said airplane which was not airworthy to continue in service carrying passengers and cargo close to its maximum load limit without going immediately to the nearest airport and landing and obtaining new equipment."

I charged the jury as follows:

"In order to determine whether there was wilful misconduct, the first thing that must be understood is what is meant by wilful misconduct. I charge you that wilful ordinarily means intentional, that the act that was done was what the person doing it meant to do, but this phrase, wilful misconduct, means something more than that. It means that in addition to doing the act in question, the actor must have intended to do that act, or with respect to that act he must have launched on such a line of conduct with knowledge of what the consequences probably would be, and have gone ahead recklessly, despite his knowledge of those consequences. In order that the act may be characterized as wilful, there must be on the part of the person or persons sought to be charged, a conscious intent to do or omit doing the act from which harm results to an-

other, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.

Now, to put it with the same ultimate definition, but in other words, I should give you another definition which does not in any way take away from what I have just now said, but I think perhaps explains it a little more fully. I shall explain to you again what wilful misconduct in this case is. It does not mean that the defendant or any of its employees had a deliberate intention to kill the decedents or to wreck this airplane. Wilful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences of the performance of the act. Likewise, the intentional omission of some acts with knowledge that such omission will probably result in damage or injury, or the intentional omission of some acts in a manner from which it could be implied reckless disregard of the probable consequences of the omission, would also be wilful misconduct.

Of course, if you determine that there was no such wilful misconduct, then you must stop right there as to that and turn to the other facet of the case, the first facet of this case, which contains a limitation of liability. That is Section 20.

If, however, you find that the defendant or any of its employees committed one or more acts of wilful misconduct, then you must go on and consider whether or not such wilful misconduct as you have found was the proximate or legal cause of the death of these decedents."

See *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105 (1st Dept.), 152, aff'd without opinion, 305 N. Y. 830; cert. den. 346 U. S. 874; *Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. (2d) 122 (C. A. 2, 1951); cf. *American Airlines* v. *Ulen*, 186 F. (2d) 529 (C. A. D. C. 1949).

There is no doubt that specification (a) is true insofar as the related facts are concerned and without the legal conclusions. Flight Officer Lewis admitted that Captain Claude was in control of the plane on the approach to Love Field; that the No. 1 engine had been feathered previously. He was aware of Civil Air Regulations which specified that the captain was in command of the flight* and was authorized to make decisions in an emergency.** Nevertheless, he took it upon himself to feather the No. 4 engine at a time when he knew Captain Claude was following emergency procedure for a go-around. Lewis testified on direct as follows:

> "Q. What happened? A. Approximately a half mile from the south boundary of the field before he had got lined up, Mr. Forbes advised him that No. 4 engine was failing.
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> Q. No. 4 was failing? Or did he mention something about fuel flowage? A. I don't know to this day whether he said No. 4 engine is going out, quitting, failing, but he implied to both of us that No. 4 engine was having difficulty.
>
> Q. Whatever he said, he gave you the immediate impression that No. 4 engine had failed? A. That is right.
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> Q. What happened after that? A. Captain Claude asked—he didn't ask—he merely said, 'Try the booster pump to No. 4 engine.'

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*Reg. § 61.301, 14 CFR 725.

**Reg. § 61.310, 14 CFR 727.

Q. Try the booster pump to No. 4 engine? A. Yes.

Q. Who did apply the booster pump to No. 4 engine? A. Mr. Forbes.

Q. Did you see him do that? A. Yes.

Q. After he did that— A. Now, I would like to—I didn't see him actually apply the pump; I saw his hand go up in the air toward the panel. Whether the pump ever turned on I don't know.

Q. Now, what was the next thing that you observed? A. I observed that the airplane was rapidly losing air speed and drifting to the left of the runway.

The Court: What was that?

The Witness: I observed that the airplane was rapidly losing air speed and drifting further to the left of the runway.

Q. What was the speed of the plane at that time when you observed the plane rapidly losing altitude, after you saw Mr. Forbes reach out for the booster pump? A. Approximately 110 miles an hour.

Q. What is the stalling speed of that plane? A. I can't answer that question unless—an airplane has different stalling speeds: Clean stall, partial gear extension stall, full flaps stall.

Q. Let me ask you this: With full flaps, with the landing gear down and with the flaps fully extended, as that plane was in, with the load it had under those conditions, approximately what was the stalling speed? A. I would have to have a chart to tell you accurately. Approximately 90 miles an hour.

Q. Now, you say you saw the plane losing altitude and drifting more to the left of that north and south runway? A. Yes.

Q. How far was the plane at that time from the edge of that runway or the boundary of the field when you saw this happen? Were you inside the boundary of the field by that time? A. It was all simultaneous, traveling along. At approximately 110 to 120 miles an hour, a quarter of a mile from the field, you are actually over the field in a very short period of time.

Q. Just a matter of seconds? A. Yes, it is.

Q. So you can't say exactly where it was at that time with respect to that runway? A. Progessively approaching the end of the runway, drifting to the left of it, and continuing to drift to the left of it.

Q. With that situation as it was, what was the next thing you observed happen? A. The airplane dropped the left wing.

Q. In other words, the left wing came down? A. Yes.

Q. What did that indicate to you as a pilot? A. It indicated to me that the air plane was in an abnormal attitude to land out of.

Mr. Laufer: What was that last word?

The Witness: The airplane had assumed an attitude, that it would be almost impossible to effect a landing out of on the runway.

Q. What if anything did the captain do or say at that time? A. He immediately hollered for full power.

Q. For full power? And who gave full power? A. He applied it partially and I pushed it on by myself.

Q. In other words, you pushed the throttle forward? A. Yes.

Q. Did the left wing come up or did it start to come up, or what happened with respect to the left

wing? A. Well, at the time we were applying the power the aircraft had started to assume a normal attitude, with the full application of the right aileron control.

Q. Power didn't make any difference at that point? A. No.

Q. Did it come up to almost level position? A. Yes.

Q. That was while the plane was to the left of this runway? A. It was.

Q. By the time it returned level how far was the plane from the edge of the runway? A. You mean west of the runway?

Q. Either way. A. West of the runway. I would say we were probably two to three hundred feet.

Q. South of the runway? A. We were already inside the boundary of the field.

Q. Had you reached a point that was beyond the end of the runway as far as north and south was concerned? A. We had.

Q. So, if this were the runway, by this time you were up to a point about here (indicating)? A. Yes.

Q. By the time it became level? A. Yes.

Q. When you got to that point what did you see, what did you observe and what happened after that? A. Applied full power and I retracted the gear.

Q. Did the captain give an order to retract the gear? A. I didn't hear him give it, but it has been testified——

Q. I just want to know whether he gave it——

Mr. Laufer: Let him finish.

The Witness: I didn't hear him actually give the command to retract the gear.

Mr. Laufer: If your Honor please, he was saying something else when Mr. Junkerman interrupted him.

Q. Please say whatever you were saying when Mr. Laufer says I interrupted? A. I was going to say that it has been testified by both Mr. Forbes and Captain Claude that the order was given. I say I didn't hear it.

Q. Then why did you retract the gear? A. It was normal procedure in an emergency, a go-around.

Q. Did you think the captain was following emergency procedure for another go-around? A. Yes.

Q. Is that the reason you pulled up the gear? A. Yes, it was.

Q. You pulled up the gear. Did you make any attempt to pull up the flaps? A. No, sir.

Q. Why not? A. The air speed of the airplane was too low to retract.

Q. If you had retracted the flaps at that time what would have happened? A. The airplane would have immediately stalled where it was.

Q. How high were you above the level of the ground at that time? A. Approximately 20 feet.

Q. So the application or retracting the flaps, would have a tendency to immediately settle the plane, would it not? A. Yes, at that speed.

Q. Well, now, after you pulled the gear up, retracted the gear, what did you observe with respect to the No. 2, 3 and 4 engines? A. I observed that No. 4 engine had no fuel pressure, no fuel flow, manifold pressure was dropping, the tachometer indicated the engine was turning 1300 revolutions a minute.

Q. Did you look out to see the engine? A. No.

Q. You couldn't see it at that time, I suppose because of darkness? A. There was no need to look at it.

Q. Anyway, you didn't look? A. No.

Q. Were you able to see whether or not the propeller was windmilling?

Mr. Laufer: He just said he didn't look at it.

Mr. Junkerman: I am asking about the propeller now.

Mr. Laufer: Well, the propeller is on the engine.

Mr. Junkerman: I know that.

The Court: Could you see the propeller?

The Witness: I could have seen it had I looked at it.

The Court: You didn't look?

The Witness: No. My tachometer indicated that the engine was turning——

Mr. Laufer: I move to strike it out. The last part of the answer is not responsive.

Q. What did you look at to determine whether or not that No. 4 engine was turning up? A. The tachometer.

Q. What did you observe with respect to the tachometer? A. The engine was turning 1300 rpm.

Q. What does that mean to you as a pilot? A. To me, that the engine was windmilling.

Q. What effect would windmilling have upon the forward motion of the plane? A. It created drag. It would make it impossible, there would be so much drag to the airplane that it would be impossible to fly out of the field, or even continue level flight, for that matter.

Q. What did you do? A. I feathered the No. 4 engine.

Q. Feathering, then, would have the effect of minimizing the drag from that engine, would it? A. It would.

Q. After you did that what was the next thing you did or said? A. The airplane was already in a climbing left stall. I picked up the microphone and told the tower we were losing the airplane

and to get emergency equipment to the scene, or words to that effect.

Q. And right after that the accident happened? A. I also advised them we had just feathered No. 4 engine.

Q. And how soon a time after you said that did the accident happen? A. My transmission was cut off by the impact."

He testified on cross as follows:

"Q. Would the gear be retracted on a go-around to relieve drag? A. Yes, sir.

Q. And feathering No. 4 you say also relieves the drag? A. Yes, sir.

Q. It also stops the power, doesn't it? A. No, sir.

Q. There was no power being developed in your opinion? A. In my opinion there was no power being developed in No. 4 engine at the time it was feathered.

Q. Because you looked at the tachometer? A. I looked at the No. 4 engine——

Q. You said you looked at the tachometer. I think you said it was turning 1300 rpm? A. Yes, sir.

Q. Well, that is developing power, isn't it? A. No, sir.

Q. Well, idling it would be about 300 rpm, would it not? A. That is a different set of circumstances.

Q. Were you in court when Captain Sperry testified as to the speed at which the prop idled? A. I was.

Q. Did you recall him saying it idles at 600 to 800 rpm? A. I do.

Q. That anything above idling would be some thrust or power?

Mr. Junkerman: If your Honor please, I object to that. Captain Sperry was talking about on the ground and not in the air.

Q. Well, this is 20 feet off the ground. A. Sir, that is in flight.

Q. And you say that 1300 rpm shown on the tachometer 20 feet above the ground would be developing no power? A. No, sir. It is an absolute failure.

Q. How about 1800 rpm? A. It would depend on the manifold pressure being applied to the engine.

Q. Well, I assume at a moment like that you would be applying full maximum manifold pressure to get maximum power? A. Sir, the engine was not running, regardless of the position of the throttle; you get no manifold pressure.

Q. You only knew that because you looked at the instrument? A. That is right.

Q. Suppose these instruments were defective? A. If we had five instruments that had simultaneous failure, which would be very improbable.

Q. You looked at five instruments? A. Yes.

Q. And all five showed about 1300 rpm? A. That the engine was inoperative."

In his deposition, Captain Claude testified as follows:

"Q. Was the fuel booster pump put to number four engine? A. It was.

Q. And which member of the crew performed that test? A. The Engineer.

Q. And what occurred after that? A. Number four engine surged.

Q. Now, at what point, with respect to Love Field, and using the diagram, (Plaintiffs' Exhibit 11 on the trial) would you say that number four engine

surged? A. Just after crossing the end of the runway.

* * * * *

Q. Was it at that point you say the number four engine surged? A. Yes.

Mr. Osnato: Can we mark it with an 'F' exactly where the Captain said?

Q. Now, you have put in 'F' alongside the letters 36, which indicates the end, the south end of the runway you were attempting to land on? A. Yes.

Q. Now, you say it was at this point number four engine surged, is that correct? A. Yes.

Q. Will you state the manner in which you determined it surged? A. The aircraft turned to the left, the left wing dropping, and by pressure on the controls.

Q. Now, what controls did you feel the pressure on? A. The right rudder.

Q. The other instrument? A. The aileron.

Q. Which aileron? A. Went into a left bank, why the ailerons are hooked together and you turn the wheel to the right and bring it back up to level, you feel it on both the ailerons and the rudder.

Q. So that it is your testimony that you felt the number four engine surge, after the fuel booster pump was put to the number four engine, by the feel of the controls, is that correct? A. Correct.

* * * * *

Q. In other words, you have marked the letter 'C' with an 'X' mark on the line at the point at which the left wing came up? A. That is correct.

Q. Is it at this point that you ordered power to all three engines or applied power to all three engines? A. It was.

Q. On that, if I understand you correctly, you retarded the power on three and four and you advanced the power on number two, thereby bringing the left wing up? A. Correct.

Q. And that occurred at the point marked letter 'G'? A. Correct.

Q. Now, what was the altitude of the plane at that point, with respect to the field level? A. I would say thirty to forty feet.

Q. Above the field? A. Above the field, yes, sir.

Q. And what was the attitude of the airplane? A. Horizontally level and climbing.

Q. Now, up to what point did the plane continue to climb? A. To a point just after crossing runway number 7.

Q. Now, will you indicate on (Plaintiffs' Exhibit 11), the point you have just described, by letter 'H'? A. Correct.

Q. Now between the points shown 'G' and 'H' you state that the plane was climbing, is that correct? A. Correct.

Q. Now what occurred at the time the plane reached the point marked 'H'? A. At point 'H' she commenced to burble, with an indication of a stall.

Q. Burble? A. Well, buffeting, you could call it.

Q. And what happened? A. Well, that is an indication of a complete stall, and I knew she was gone.

Q. Now, from a point marked 'H' to the point which there is a cross-mark on the line just below the word 'field', on (Plaintiffs' Exhibit 11) could you state what occurred? A. She, the airplane, had stalled then, was settling and going down, and I knew we would never clear that hangar, and I called to the crew that she was gone.

Q. Now, you made reference to a hangar, is there a hangar at the field? A. There is a line of old

wooden hangars across here, I think these represent them. (Indicating.)

Q. Was there a hangar there on the morning of November 29, 1949? A. Yes.

Q. Is that the Dallas Aviation Hangar? A. I think it was, yes.

Q. And was that the hangar—with what did the airplane come in contact for the first time after the stall? A. The left wing tip hit the north end of the hangar and I guess you could call it the northeast corner of the hangar.

Q. And now at the time that the plane was at the position shown by your ink mark 'H', made this morning, can you state what the altitude of the plane was with respect to the hangar?

Mr. Osnato: The altitude with respect to the hangar?

Mr. Laufer: That is right.

A. It was at the time the buffeting occurred, the airplane was above the elevation of the hangar roof, and up to that point I was fully convinced we would clear the hangar and go around okay, and she stalled out and she settled.

Q. Now, at that time, up to that time had you given any order to feather number four prop? A. I had not.

Q. Did anybody inform you that number four prop was feathered, or was to be feathered? A. No.

Q. When for the first time did you learn that number four prop had been feathered? A. The C. A. B. hearing in Dallas, about the 12th or 13th of December."

Flight Engineer Forbes was also unaware that Lewis had feathered the number 4 engine.

In order to find wilful misconduct the jury was required to believe that (i) the competent producing cause of the accident was Lewis' act of feathering the number 4 engine and (ii) Lewis' act was unjustified. Might the jury have so found from the evidence?

Captain Claude stated that in his opinion Lewis' act caused the crash. This presupposes that the number 4 engine was still developing power at the time Lewis feathered it. Captain Claude said that it was, that he could feel it in the controls.

Lewis testified that his act was based upon the instruments which indicated the No. 4 engine was windmilling. As between Claude and Lewis, the jury could have believed Claude that the engine was developing power and not windmilling. Of course, resolving this issue in favor of Claude does not justify a finding of wilful misconduct.

There would be required, in addition, a rejection of Lewis' explanation of his action. But as far as I can gather, there is no evidence, nor did the plaintiffs ever contend, that the instruments upon which Lewis based his actions did not in fact indicate windmilling. To the contrary, plaintiffs attempted to show poor maintenance of the plane as reflected in, among other things, its instruments. At page 12 of plaintiffs' memorandum in opposition to this motion appears the following:

> "It is important to remember that this plane had a very bad maintenance history; that it showed regular trouble with gauges and instruments besides trouble with No. 1 and No. 4 engines which defendant claims was always corrected. Captain Claude testified that No. 4 engine never went out and that when the Flight Engineer called to his attention that 'the fuel pressure on number 4 engine had gone to zero' he ordered the booster pump to that engine and the

engine surged or over-sped. That meant that the engine was working but the gauge was wrong. The record shows that even on this same flight the cowl flap instrument was not accurate, the fuel flow tachometer fluctuated and that the air temperature gauge on No. 4 was inoperative for some time before!"

Therefore, if the jury based its verdict upon Lewis' violation of the Civil Air Regulations in pre-empting the Captain, the evidence was insufficient to find wilful misconduct. It may not be said that Lewis' feathering of the No. 4 engine—a violation though it is—was performed knowing that it would probably result in injury or was performed in such manner as to imply a reckless disregard of its consequences. From the undisputed evidence he used his judgment in an attempt to save the plane and this is not, under the circumstances, wilful misconduct.

Specification (b) is true in part as far as the facts are concerned, and not considering the legal conclusion.

Prior to feathering the No. 4 engine Lewis retracted the landing gear but did not raise the flaps. Captain Claude said that he ordered the gear and flaps up—an order heard by the Flight Engineer—but Lewis said he did not hear it.

His testimony, again:

"Q. When you got to that point what did you see, what did you observe and what happened after that? A. Applied full power and I retracted the gear.

Q. Did the captain give an order to retract the gear? A. I didn't hear him give it, but it has been testified—

Q. I just want to know whether he gave it—

Mr. Laufer: Let him finish.

The Witness: I didn't hear him actually give the command to retract the gear.

Mr. Laufer: If your Honor please, he was saying something else when Mr. Junkerman interrupted him.

Q. Please say whatever you were saying when Mr. Laufer says I interrupted? A. I was going to say that it has been testified by both Mr. Forbes and Captain Claude that the order was given. I say I didn't hear it.

Q. Then why did you retract the gear? A. It was normal procedure in an emergency, a go-around.

Q. Did you think the captain was following emergency procedure for another go-around? A. Yes.

Q. Is that the reason you pulled up the gear? A. Yes, it was.

Q. You pulled up the gear. Did you make any attempt to pull up the flaps? A. No, sir.

Q. Why not? A. The air speed of the airplane was too low to retract.

Q. If you had retracted the flaps at that time what would have happened? A. The airplane would have immediately stalled where it was.

Q. How high were you above the level of the ground at that time? A. Approximately 20 feet.

Q. So the application or retracting the flaps would have a tendency to immediately settle the plane, would it not? A. Yes, at that speed."

It may be said of Lewis in this instance that he was inattentive, hard of hearing or substituting his judgment for the Captain's. The jury could have thought the latter. But if it did, what evidence is there aside from the crash that his judgment was poor? There is none. As indicated heretofore, the Captain attributed the crash to the feathering and no one on plaintiffs' side detracted in the slightest from Lewis' opinion that raising the flaps under the circumstances would have caused an immediate settling of the

plane. The jury may have chosen to disregard Lewis' opinion but if it did there was no evidence upon which to base a contrary judgment.

Therefore, to the extent that the expression "with full knowledge of the probable consequences of such act" in specification (b) implies a crash, there was no proof to sustain it.

The remaining specifications are more or less unwarranted conclusions of counsel or are general statements, some of which were not proven. There is no basis upon which the jury might find wilful misconduct from any one or combination of these specifications. On the contrary, the evidence adduced was consistent only with airworthiness of the plane at the time it departed on its ill-fated flight.

Assuming that the plane crash was caused by the act of co-Pilot Lewis in cutting out the No. 4 engine by feathering and by a failure to retract the flaps as directed by Captain Claude, I am convinced that plaintiffs have not made out a case on the theory that the accident was caused by the wilful misconduct of defendant and its employees. In coming to this conclusion I am not passing on any disputed version of any of the witnesses; I am not passing on the credibility of the story told by one witness as against that told by another. I am viewing the evidence with all inferences favorable to plaintiffs and considering all the evidence most favorable to plaintiffs' theory and claim in this respect. In so doing, I am strongly convinced that from all such evidence the jury was not justified in bringing in a verdict which by its very terms was a finding that this accident, which resulted in the death of Mr. and Mrs. Grey, was caused and brought about by the wilful misconduct of defendant, its agents and servants, as defined by me in my charge to the jury, to which no exception was taken.

The motion to set aside the verdict of the jury is granted and the plaintiffs shall have judgment for $8,300 for the death of Harry M. Goldberg and $8,300 for the death of Sophie Goldberg.

I will now take up defendant's motion for a new trial on the grounds that the verdicts are contrary to the evidence and the law and are excessive.

While this motion is made in the alternative, I believe I have to pass on it, notwithstanding that I have decided the first motion in favor of defendants. *Montgomery Ward and Co.* v. *Duncan*, 311 U. S. 243.

In passing on the second part of the motion I am only concerned with the amount of the verdicts. As I stated before, the verdicts were as follows:

For the death of Harry M. Goldberg:

Howard M. Grey	$50,000.
Doris S. Grey	$30,000.

For the death of Sophie Goldberg:

Howard M. Grey	$ 5,000.
Doris S. Grey	$ 5,000.

I charged the jury that in awarding damages they should take into consideration the following:

1. Pecuniary loss of contributions of each parent for support, education and so forth during minority.

2. The value of the services which each parent might and would have rendered in training and educating the children during minority.

3. The loss of reasonable contributions each child might receive after majority from the parent.

4. The loss of prospective accumulations of the parent during his or her lifetime.

At the time of his death Harry M. Goldberg was 47 years of age and had a life expectancy of about 23 years. His wife Sophie was 42 years of age and had a life expectancy of about 26 years. At the time of the deaths of their father and mother, Howard Grey was 17 years and 3 months of age and his sister was 20 years and 3 months of age.

At the time of his death Harry M. Goldberg was earning $12,500 a year, with good prospects for increments. He had assets consisting of a home for which no value was given and participation in a profit-sharing plan which had accumulated $5,800 in about 5 years.

Sophie Goldberg had no income and no assets.

I think it will be helpful to take up the various items of damage to which each child was entitled:

1. Pecuniary loss during minority. Here we start with the yearly salary of the father ($12,500). There was no proof as to taxes or other obligations. There is little to base any finding as to how much was expended for each child, but we do know this: that Howard had about 3 years and 9 months, or approximately 45 months, left of his minority, while Doris had 9 months left.

Assuming, *arguendo,* that the father netted $12,500 a year, we may further assume that one-fourth of this amount might be allocated to a child. Following these assumptions, the calculation shows that Howard's pecuniary loss would be about $11,700; for Doris it would be about $2,350.

These assumptions are quite liberal, as I see it. They do not take into account any deduction for income taxes and they do contemplate the expenditure of one-half the income for the children's support, etc.

It should be noted, too, that at the time of the death of her father Doris was earning $40 per week and contemplat-

ing marriage, and did marry two months later. It is apparent that her pecuniary loss was, if any, very little.

The children had no pecuniary loss as the result of their mother's death since there was no proof that the mother had any income or property.

2. Value of services for training, education, etc.

Of course, this is an intangible item and may not be measured by any exact pecuniary standard. One should bear in mind, however, the rather short time the children, under the law, might be compensated for their loss of service. However, in arriving at a monetary figure for the loss of the father, one may consider the jury's verdict in assessing damages for the loss of the mother.

Since there was no proof of any income or property for the mother, the verdict of the jury awarding $5,000 to each of the children can represent only the value of loss of service for care, maintenance, etc. If Howard's loss was $5,000, Doris' had to be appreciably less in view of her marriage before reaching 21 years and her shorter period of minority remaining.

It seems to me that this value might very well be assigned for the father's loss.

3. Loss of contributions after maturity.

There is definite authority in the Texas cases for this item of damage. See *Lancaster* v. *Magrill*, 244 S. W. 1078 (1922); *International Great Northern R. Co.* v. *Acker*, 128 S. W. 2d 506 (1939). In *Hughes Production Co.* v. *Hagan*, 114 S. W. 2d 326 (1938), the court agreed that the trial judge was in error in permitting the jury to find on this item where there was no proof that the minor would have received contributions after reaching majority. *International Great Northern R. Co., supra*, supports the *Hughes* holding.

As far as I can ascertain, the only proof in this respect is that the father intended Howard to have a good education and, impliedly, would have contributed to this after the majority of the son.

4. Loss of prospective accumulations.

International Great Northern R. Co. v. *Acker, supra,* supports this item.

The only value of the father's estate or what it might be is the accumulation of $5,800 in the profit sharing plan of his employer. There was no proof as to the value of any other property he might have possessed. At the present rate of accumulation, it might be said that this fund would very well not exceed $32,480 in 23 years. Assuming that the children equally shared that amount in 23 years, it would amount to $16,240 each. At 2% interest the present value of an insurance policy of $32,480 payable at the father's death would be $20,380, for example, or $10,190 each.*

Since no proof of the mother's property was presented, the children could not anticipate accumulations from her.

I have gone into the question of damages at some length, because I realize that ordinarily a jury's verdict on the amount of damage in a case of this kind should stand, even though I might disagree as to the amount. Here there is more than that. I am not setting my judgment against that of the jury. The figures I have set forth above indicate to me clearly that the jury without doubt were influenced by sympathy for this young man and woman, who

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*Based on United States Life and Actuarial Tables, 1939-1941, Table 20, page 64. This sum is conditioned upon the slightly higher life expectancy reflected in these Tables than the 23.08 given to the jury. However, the Tables are sufficiently close (23.97) for demonstration purposes.

$32,480 discounted at 2% would be $20,597.30.

lost their father and mother in one catastrophe. That is the only way I can account for these verdicts, which can be demonstrated, and I think have been, to be excessive. I see no other recourse except to set aside these verdicts as excessive and to grant a new trial.

So Ordered.

Settle order on notice.

February 21, 1955.

EDWARD A. CONGER,
United States District Judge.